No. 93-986

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MARGARET MCINTYRE,
Petitioner,

v.

OHIO ELECTIONS COMMISSION,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF THE CALIFORNIA POLITICAL ATTORNEYS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The California Political Attorneys Association (CPAA), a bipartisan association of nearly one hundred California attorneys who practice campaign, elections, and poltical law, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

CPAA's membership represents and advises hundreds of clients—Republicans, Democrats, and independents; incumbents and challengers; ballot measure committees which support or oppose initiatives and referenda at the state and local levels; political action committees of associations, corporations, and labor organizations; individual and business entity donors; and grass roots organizations of all stripes. Most of these individuals and

organizations must comply with—and often rely upon CPAA members to advise them with respect to compliance with—California's speaker identification requirements for political mass mailings.

Individual CPAA members have represented clients in numerous enforcement proceedings of the California state agency which is responsible for interpretation and enforcement of these compelled speech requirements. The CPAA itself has appeared as an *amicus curiae* in a case pending before the California Supreme Court, challenging the constitutionality of the California requirements. The CPAA also has filed briefs *amicus curiae* in several other California appellate court proceedings to provide the courts with the insight of those who have defended persons in enforcement proceedings involving political regulations.

While speaker identification requirements provide a substantial source of business for political attorneys, CPAA files this brief because the extensive experience of its members with enforcement of the California requirements has shown the requirements to have an unduly burdensome effect on political expression, especially political expression of those least sophisticated in exercising their First Amendment rights.

SUMMARY OF ARGUMENT

California's identification requirement for political speakers shows how complex and burdensome such requirements can become. The statute and its implementing regulations are so difficult to understand that those subject to their requirements act at their peril if they seek to exercise their First Amendment right of expression without first retaining specialized legal counsel. In numerous administrative enforcement actions under the California statute, unsophisticated participants in electoral campaigns have been penalized heavily for inadvertent violations in which anonymity was not even an

issue. More sophisticated candidates and campaign committees have also been penalized under circumstances where the public was fully informed of the identity of those involved.

The experience with the California statute only underscores the constitutional infirmity of prohibitions on anonymity in political speech. As this Court held in *Talley v. State of California*, 362 U.S. 60 (1960), anonymous literature has long played an important role as a vehicle for the expression of political views that would otherwise never be expressed. Speaker identification requirements are also constitutionally infirm because they are a form of compelled speech that impermissibly burdens a private speaker's message, a point that has not been addressed by the parties.

Because speaker identification requirements directly and substantially burden speech protected by the First Amendment, strict scrutiny is required. Ohio Revised Code § 3599.09 fails both prongs of the strict scrutiny test. First, Ohio has advanced no state interest sufficiently compelling to justify its identification requirements for political speakers. Second, the statute is not narrowly tailored to apply only to speech that may properly be regulated.

ARGUMENT

This Court should hold the Ohio statute unconstitutional on its face because it, and speaker identificaiton statutes similar to it in California and other states, impermissibly infringe on rights protected by the First Amendment by prohibiting anonymity in political speech. The prohibition of anonymity does not in fact serve any public interest sufficiently compelling to justify the infringement on the First Amendment, and is not narrowly tailored to serve any interest that has been advanced to justify compelled disclosure.

Experience with the similar California statute compelling speaker identification provides numerous examples

of the pitfalls in attempts to regulate political speech by compelling identification of those responsible for it. This brief will first discuss the experience of Amicus California Political Attorneys Association (CPAA) with the California statute, because that experience is instructive on the difficulties of regulating political speech, and is a perspective that this Amicus is in a unique position to share with this Court. This brief will then support several aspects of the points made by Petitioner in this case, and by the dissent in the court below, and add additional considerations.

PART 1.

THE CALIFORNIA EXPERIENCE WITH COMPELLED SPEAKER IDENTIFICATION.

1.1 California's statute illustrates the complexity to which political speaker identification mandates are prone and the resulting burden on speech.

California's compelled speaker identification statute is instructive in the present case because it is an example of the extreme complexity to which rules mandating identification of political speakers are prone.

The statute, § 84305 of the California Government Code, is part of California's Political Reform Act, adopted by the state's voters as an initiative measure in 1974.[1] In its original form, § 84305 established a relatively simple requirement that political mass mailings

[1] The Political Reform Act of 1974, as amended, is found in California Government Code, Title 9, Chapters 1 through 11, §§ 81000-91015, inclusive. The Act is a comprehensive regulatory scheme which, among other things, requires reporting of campaign contributions and expenditures in a manner similar to that of the Federal Election Campaign Act, regulates conflicts of interest by public officials, regulates lobbying, provides auditing and enforcement procedures, and creates the Fair Political Practices Commission to interpret and enforce the provisions of the Act. All statutory references are to the California Government Code unless otherwise noted.

bear a postal bulk permit number that could be traced, or, at the option of the sender, the sender's name and address. This relatively simple requirement provided an audit trail for campaign finance audits. A series of statutory amendments and interpretative regulations, however, soon followed. The key amendment transformed the voluntary option of sender identification into a requirement, and a long slide down a slippery slope of increasingly complex regulation began. Each amendment and interpretive regulation that followed has made the rules governing how senders must be identified more complex, more confusing, and more intrusive. The trend toward ever more bewildering complexity shows no signs of abating, with further amendments being urged on the state legislature and the state Fair Political Practices Commission in every election cycle.

In its current form, § 84305 provides as follows:

> (a) Except as provided in subdivision (b), no candidate or committee shall send a mass mailing unless the name, street address, and city of the candidate or committee are shown on the outside of each piece of mail in the mass mailing and on at least one of the inserts included within each piece of mail of the mailing in no less than 6-point type which shall be in a color or print which contrasts with the background so as to be easily legible. A post office box may be stated in lieu of a street address if the organization's address is a matter of public record with the Secretary of State.
>
> (b) If the sender of the mass mailing is a single candidate or committee, the name, street address, and city of the candidate or committee need only be shown on the outside of each piece of mail.
>
> (c) If the sender of a mass mailing is a controlled committee, the name of the person controlling the committee shall be included in addition to the information required by subdivision (a). [West's Annotated Codes]

While § 84305 is complicated even when read alone, the complication and confusion is multiplied when the numerous statutes and regulations defining its terms are considered, as they must be by those subject to its mandate. The result is a daunting obstacle to individuals and organizations that want to express their views on an election issue, by means of even a relatively small mailing to other voters. Before expressing their views, those persons must make their way through a maze of confusing, multi-pronged, cross-referenced definitions and requirements in numerous statutes and regulations.[2] Those who fail are subject to penalties of $2,000 per violation in administrative enforcement actions brought by the Fair Political Practices Commission (§§ 83115-83116.5) or, for wilful violations, to misdemeanor conviction with a maximum fine of $10,000 (§ 91000) and up to six months of incarceration (Calif. Penal Code § 19). The $100 penalty imposed on Ms. McIntyre for violation of the Ohio statute appears mild by comparison.

Persons covered by § 84305 are any "candidate" or "committee."[3] The definition of "candidate" in § 82007 includes, as one would expect, any individual qualified for the ballot, but also includes any individual who has

[2] Regulations promulgated by the Fair Political Practices Commission under the authority of § 83112 of the California Government Code are found in California Code of Regulations, Title 2, Division 6, §§ 18109-18954, inclusive, and are cited herein as "FPPC Regulation § ———."

[3] Section 84305 at one time simply applied to any "person," like the Ohio statute, reading "No person shall make an expenditure for the purpose of sending a mass mailing unless . . . ." (§ 84305 as amended by Calif. Statutes 1978, Chapter 1408.) This broad application was narrowed to "candidate" and "committee" in 1984 (Calif. Statutes 1984, Chapter 1368) in response to the decision in *Schuster v. Municipal Court*, 109 Cal.App.3d 887 (1980), in which the court invalidated a similar speaker identification requirement in California Elections Code § 29410 on the grounds that it was an overly-broad infringement on the right of anonymity protected by the First Amendment. That statute, like Ohio's, applied to every "person" and to all forms of printed material concerning an election.

received any "contribution" or made any "expenditure" with a view to eventual nomination or election to any state or local office, whether or not the individual has decided on a particular office. "Committee" as defined in § 82013 means "any person or combination of persons" that receives or makes contributions or expenditures over specified threshold amounts. Thus, not only the typical campaign committee organized to support a candidate or ballot measure is subject to the identification requirement. Under the broad definition of "committee," an informal group of citizens, or even a lone individual who makes independent expenditures expressly advocating for or against a candidate or ballot measure, also qualifies as a "committee" and is subject to the speaker identification requirement. There is no warning in § 84305 itself, however, that its provisions apply to individuals.

The next question for these would-be speakers is whether the requirement applies to their chosen means of communication. The term "mass mailing" is defined in § 82041.5 as "over two hundred substantially similar pieces of mail . . . ," but is limited by FPPC Regulation § 18435 to instances when such mail is sent within a calendar month.

When the speaker determines that the proposed speech will be subject to the requirements of § 84305, the next questions concern the technical requirements of compliance. Some of these, although detailed, are apparent on the face of § 84305, which requires the speaker identification to show: (i) name, street address, and city; (ii) although a post office box may be used if the organization's address is a public record with the Secretary of State; (iii) on the outside of each mail piece; (iv) and on at least one insert unless the sender is only a single candidate or committee in which case identification is required only on the outside of each mail piece; (v) in no less than 6-point type; and (vi) in a color or print which contrasts with the background so as to be easily legible.

The technical requirements of compliance, however, also include determining and using the appropriate name for the sender, a determination that can be quite difficult. One technical requirement concerning the manner in which the sender must be identified is apparent from the face of § 84305: "(c) If the sender . . . is a controlled committee, the name of the person controlling the committee shall be included . . . ." The term "controlled committee" is defined in § 82016 as "a committee which is controlled directly or indirectly by a candidate [defined in § 82007, see discussion above] or state measure [defined in § 82051] proponent [defined in § 82047.6 by reference to the definition in California Elections Code § 3502] or which acts jointly [formerly defined in FPPC Regulation § 18585, repealed in 1976, Register 76, No. 16] with a candidate, controlled committee or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he, his agent or any other committee he controls has a significant influence on the actions or decisions of the committee."

Including the name of the controlling candidate or proponent in the identification is only a start, however, toward full compliance. First, if a committee's principal activity is the support of or opposition to a ballot measure, § 84107 requires that reference to support or opposition to the ballot measure number be included "in any reference to the committee required by law."

Second, if the sending committee qualifies as a "sponsored committee," the sponsor's name must be included in the identification on the mailing. There is no reference to this special identification requirement for "sponsored" committees in § 84305. It is only by reading several other provisions together that the requirement is revealed. Section 84102 provides, in relevant part, that "[i]n the case of a sponsored committee, the name of the committee shall include the name of its sponsor." The requirement for identification of the sponsor is made applicable to mass mailings by virtue of § 84106, which provides:

"(a) Whenever identification of a sponsored committee is required by this title, the identification shall include the full name of the committee . . . ." Under § 82048.7, a committee is deemed to be "sponsored" by any "person" that collects contributions for the committee through payroll deductions or dues from its members, officers, or employees, provides administrative services to the committee, participates in setting fundraising and spending policies for the committee, or contributes 80% or more of the committee's funds. § 82048.7. Finally, FPPC Regulation § 18435 defines "sender" as "the candidate or committee who pays for the largest portion of expenditures attributable to the designing, printing, and posting of the mailing . . . ."

Only after working through all of these definitions can a speaker subject to the identification requirement determine what form the required identification must take.[4]

1.2 Repeated experience with enforcement of California's speaker identification statute reveals its chilling impact on political speech.

Amicus CPAA's members have extensive experience in representing persons who are prosecuted by California's Fair Political Practices Commission (the "FPPC") for violations of § 84305's speaker identification requirements, under the administrative enforcement provisions of California's Political Reform Act.[5] Examples of the reported

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[4] Ohio Revised Code § 3599.09, by contrast, is vague and uncertain due to its use of extremely general terminology. Its requirement, for instance, that identification appear "in a conspicuous place" is simple; but it is also vulnerable to subjective interpretation in enforcement. The Ohio statute exempts "personal correspondence" in general language that also is vulnerable to subjective interpretation; the California statute has a more precise numerical threshold, requiring identification on a "mass mailing," defined as over 200 "substantially similar" pieces of mail.

[5] The FPPC is authorized to prosecute violations of the Political Reform Act by §§ 83115 through 83116.5 of the Government Code. Violations are punishable by monetary penalties of up to $2,000.

enforcement actions demonstrate how the speaker identification provisions are a trap for the unwary, and even for the wary, and create an expensive and chilling burden on political speech.

A. Speaker identification requirements penalize those least sophisticated in the political process and most in need of the protections of the First Amendment.

Ms. McIntyre is an example of an individual citizen, exercising her First Amendment rights, who was not seeking to preserve her anonymity but was nonetheless punished for an apparently inadvertent violation of a speaker identification requirement. Ms. McIntyre's case, unfortunately, is not anomalous.

FPPC enforcement decisions repeatedly demonstrate how the speaker identification requirement in California has been a trap for the unwary—unsophisticated individuals or groups of citizens who think that the Constitution protects their right to voice their opinions to their fellow citizens in an election campaign, but find out too late that they have violated a law in speaking out.

1. Riverside Tomorrow Citizens' Group Enforcement Case.

In this enforcement action, the FPPC imposed a $4,000 fine on a local, grass-roots group of voters, whose members were unaware of the fine points of campaign mailing identification. *In the Matter of Riverside Tomorrow—Riverside Landowners & Arlington Heights Landowners*

The FPPC assesses such penalties on a per-violation basis, without regard to fault. § 83116(c). The FPPC's administrative enforcement decisions are published by California Continuing Education of the Bar, cited in this brief as [year] CEB FPPC Enforcement Decisions [page]. Because the FPPC enforcement decisions are not readily available in law libraries, we have lodged with the Court and served on the parties copies of the decisions that are cited in this brief.

Association Committee (FPPC No. 88/239, 1990-1992 CEB FPPC Enforcement Decisions 731). Their committee had sent two mass mailings which failed to include the name of the committee's sponsor in the name of the committee. The first mailing urged a "no" vote on a local ballot measure, and contained the sender identification "Riverside Tomorrow—A Citizens' Lobby" together with the sender's address. However, that identification lacked the name of the *sponsoring* organization, the Arlington Heights Landowners Association.

The second mailing bore the same sender name and address. However, this mailing also contained a cover letter with the name and logo of the "Arlington Heights Citizens Association." The FPPC's enforcement decision, while noting that "the committee did not have any prior experience with campaign committees or reporting requirements, listed as "factors in aggravation":

> . . . the mailers' identification deprived the public of knowledge of [Arlington Heights Landowners Association]'s involvement in the mailers. This information would have allowed the voters to better evaluate the mailers' contents. . . . Furthermore, the Measure E mailing was identified on the inside as being from the Arlington Heights *Citizens* Association rather that [sic] the Arlington Heights *Landowners* Association.

Id., 1990-1992 CEB FPPC Enforcement Decisions at 737.

2. California Judges Association Enforcement Case.

In this case, the FPPC imposed a $2,000 fine on the California Judges Association's Committee for Public Responsibility ("CJA-CPR"), formed to oppose a statewide ballot measure which would have capped state judges' salaries. *In the Matter of California Judges Association—Committee for Public Responsibility* (FPPC No. 89/186, 1990-1992 CEB FPPC Enforcement Decisions 27). Once again, anonymity was not the issue. The judges were

fined because, while postcards paid for by the committee and mailed by individual judges referred to both the judges' association and the individual judge, the identification was not in the precise form required by the statute.

The committee designed and produced 180,000 "Dear Friend" postcards urging recipients to join with several organizations, including the California Judges Association, in opposing the ballot measure. Individual judges signed and sent the postcards to voters in their jurisdictions. The committee paid most of the postage costs.

The FPPC found that the California Judges Association violated the law because:

> Neither the front or the back of the postcard contained the name, street address and city of the CJA-CPR committee, which qualified as the "sender" of the mass mailing pursuant to Regulation 18435.

The FPPC noted as a "Factor in Aggravation" that "recipients of the 'Dear Friend' postcards were not aware that CJA-CPR was the true sender of the mailing rather than the individual judge who signed the postcard." The committee of judges was fined, notwithstanding the FPPC's finding in mitigation that:

> The CJR-CPR members responsible for designing and reviewing the postcard were relatively inexperienced in political campaigns and were not aware of the sender identification requirement for mass mailings. The committee believed that since the postcards were sent by individual judges that they did not require committee identification. . . .

Id. at 32.

3. *Alliance for Mission Viejo Enforcement Case.*

In this case, the FPPC fined another local, grass-roots citizens committee $2,000. *In the Matter of Alliance for Mission Viejo—Yes on Measure A, Yes on Recall* (FPPC No. 90/163, 1990-1992 CEB FPPC Enforcement Decisions 183). A citizens group paid for and sent a mass mailing containing a political statement by a well-known local figure, Orange County Supervisor Tom Riley, regarding *his* position on the impact of a local ballot measure, a position with which the citizens group agreed. The mailing used Riley's letterhead with his name and address. The name and address of the citizens group did not appear on the mailing. When the committee learned that the statute required its name and address to appear on the mailing, it promptly reported its omission to the FPPC. Although the violation was inadvertent and voluntarily reported, the FPPC imposed the maximum administrative fine of $2,000.

B. Speaker identification requirements become a trap even for the wary, because of the complex web of requirements woven to compel disclosure of the "real" sender in the eyes of the statutory scheme.

The FPPC's enforcement decisions also illustrate how a complex statutory scheme for compelled speaker identification becomes a trap even for relatively sophisticated participants in the political process, burdening—and punishing—their speech.

1. *Barbara Riordan Enforcement Case.*

In this enforcement case, the FPPC imposed a $1,000 fine on a county supervisor who mailed to voters a tabloid-style campaign mailing that identified a different "sender" than the statute required, but otherwise complied with the location, size, and legibility requirements of the statute. *In the Matter of Barbara Riordan and "Barbara Riordan for Supervisor Committee"* (FPPC No. 88/583, 1987-1989 CEB FPPC Enforcement Decisions 881). The mailing identified the sender as "Yucaipa Citizens for Supervisor Riordan Re-election." The FPPC found that Yucaipa supporters of the Supervisor did in fact conceive, design and print the newsletter. However, it imposed a fine because, under § 84305 and FPPC Regula-

tion § 18435, "Barbara Riordan for Supervisor Committee," the committee that paid for the mailing, should have been identified.

2. *Trice Harvey Enforcement Case.*

In *In the Matter of Assemblyman Trice Harvey, Committee to Elect Trice Harvey, and Mark Abernathy* (FPPC No. FC-86/512, 1987-1989 CEB FPPC Enforcement Decisions 123), the FPPC imposed a fine of $1,000 upon the respondents for sending a fundraising letter which did not comply with the California speaker identification requirements. The mass mailing was a fundraising letter sent by Assemblyman Harvey's committee. The format of the solicitation was a letter from then-California Governor George Deukmejian, endorsing Assemblyman Harvey. Harvey was clearly identified as the endorsee, and the mailing contained solicitation materials directing contributors to make checks payable to Harvey's committee and to return the checks in a "business return envelope" addressed to Harvey's committee. However, the mailing did not comply with the requirements of California law because it did not include Harvey's full committee name and address on the *outside* envelope.

The result of California's complex statutory scheme and the FPPC's policy of zealous, hyper-technical, absolute-liability enforcement is to require any citizen who wants to be heard in state or local political campaigns in California either to become thoroughly familiar with a set of statutes and regulations that is difficult even for experienced attorneys to master, or to engage legal counsel to advise on compliance. Hiring an attorney, however, should not be a condition of safely exercising one's First Amendment right to unfettered political expression.

1.3 California state court decisions have cast doubt on the constitutionality of § 84305.

In *Schuster v. Municipal Court*, 109 Cal.App.3d 887 (1980) the California Court of Appeal invalidated a compelled speaker identification provision formerly found in California Elections Code § 29410, which was very similar to the Ohio statute challenged in this case. The statute provided, in relevant part: "Every person . . . is guilty of a misdemeanor who causes to be reproduced . . . any . . . matter having reference to an election . . . unless there appears . . . the name and address of the business or residence of a person responsible for it." The court found that this speaker identification requirement was an overly-broad infringement on the right of anonymity protected by the First Amendment. *Schuster*, 109 Cal.App.3d at 899. The California Supreme Court denied review, and this Court denied a petition for a writ of certiorari. *Id.*, 109 Cal.App.3d at 899, *cert. denied*, 450 U.S. 1042 (1981).

California's current speaker identification requirement, California Government Code § 84305, was amended and re-worded in part to cure the defects that the *Schuster* court found in former California Elections Code § 29410. However, even as amended, the speaker identification requirements in § 84305 are not distinguishable from those of former Elections Code § 29410 for purposes of First Amendment analysis, and are invalid for the same reasons that the *Schuster* court invalidated former California Elections Code § 29410.

The constitutionality of § 84305 itself is now before the California Supreme Court for review, in *Griset, et al. v. Fair Political Practices Commission*, California Supreme Court No. G011724. The court accepted review on petitions by both parties from a decision of the state Court of Appeal, which had upheld the validity of § 84305 as applied to candidates and candidate-controlled committees, but invalidated the statute on First Amend-

ment grounds as applied to any other person who would fall within its scope—including committees supporting or opposing ballot measures and persons or committees making independent expenditures concerning candidates or ballot measures. *See Griset, et al. v. Fair Political Practices Commission*, 20 Cal.App.4th 1114, 1118-22 (1992) (reprinted to permit tracking pending review).

Briefing in the California Supreme Court has been completed, but the court has not yet announced a date for oral argument.

PART 2.

OHIO'S REQUIREMENT FOR SPEAKER IDENTIFICATION IN POLITICAL SPEECH IS UNCONSTITUTIONAL ON ITS FACE.

2.1 Prohibiting anonymity in political speech infringes on the First Amendment.

Amicus CPAA agrees with Petitioner's argument that Ohio's speaker identification requirement constitutes a flat ban on anonymity in printed political speech, and that such a ban is prohibited by the First Amendment and by this Court's decision in *Talley v. State of California, supra*, 362 U.S. 60 and cases cited in *Talley*.

The First Amendment right of anonymity recognized in *Talley* applies with at least equal vigor to political speech of the type regulated by the Ohio and California statutes. This Court has repeatedly emphasized, in a variety of factual contexts, that political speech is at the core of the values protected by the First Amendment: "[T]he constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office," *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971); "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms

of government, the manner in which government is operated or should be operated, and all such matters relating to political processes," *Mills v. State of Alabama*, 384 U.S. 214, 218-219 (1966); and "[t]he political candidate does not lose the protection of the First Amendment when he declares himself for public office. Quite to the contrary . . . . ," *Brown v. Hartlage*, 456 U.S. 45, 53 (1982).

2.2 Speaker identification requirements also infringe on the First Amendment by compelling speech that impermissibly burdens the speaker's message.

There is another aspect of speaker identification requirements that was not discussed in the Ohio Supreme Court's decision below or in the petition for certiorari. Unlike campaign finance reporting requirements, Ohio Revised Code § 3599.09, and to an even greater extent its California counterpart, California Government Code § 84305, affirmatively compel all covered speakers to disclose the speaker's identity and often the speaker's affiliations, all as part of the communication itself. The statements they require are thus content-based, compelled speech.

Ohio Revised Code § 3599.09 compels all persons and organizations that wish to engage in written political expression, other than in personal correspondence, to disclose their identity as part of the communication itself.[6] The effect of this requirement is to "burden[] a speaker with unwanted speech" during the course of the speak-

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[6] Ohio Revised Code § 3599.09 requires written identification on the political communications of "the chairman, treasurer, or secretary of the organization issuing" or "the person which issues, makes, or is responsible" for the communication. Similarly, California Government Code § 84305 compels candidates and committees that send as few as 201 substantially similar pieces of mail to identify themselves on the mailing, and where applicable, list the names of persons "controlling" or "sponsoring" them. See section 1.1 of this brief.

er's own message. *See Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781, 800 (1988). Because it "[m]andat[es] speech that a speaker would not otherwise make," Ohio Revised Code § 3599.09 is a content-based regulation of speech, "subject to exacting First Amendment scrutiny." *Id.* at 795, 798; *see First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

In *Riley v. National Federation of the Blind of N.C.*, this Court struck down a North Carolina statute that required professional fundraisers for charitable organizations to tell potential donors the percentage of contributions collected during the previous twelve months that had actually gone to charity. Observing "the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored," the Court held that the statute was a content-based regulation of speech, and could not withstand "exacting First Amendment scrutiny." *Id.* at 798, 800.

A statute compelling speech fails the narrow tailoring requirement when government has the option of itself publishing information obtained from mandatory disclosure forms but elects instead to compel a private speaker to include the information in the speaker's own message. *Riley v. National Federation of the Blind of N.C.*, 487 U.S. at 800; *cf. Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981). In *Riley*, the Court found that the speech compelled by the North Carolina statute was unduly burdensome and not narrowly tailored to achieve the state's goal of dispelling public "misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity." *Riley*, 487 U.S. at 799. The requirement was unduly burdensome because it would "hamper the legitimate efforts of professional fundraisers" to raise funds for charities:

> [I]n the context of a verbal solicitation, if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone.

Id. at 799-800, footnote omitted.[7]

The statute failed the narrow tailoring requirement because other provisions of the North Carolina law required professional fundraisers to file financial disclosure forms that detailed the share of funds allocated to overhead as opposed to charity. Publication *by the state* of that detailed information would serve the same public information, anti-deception purpose "without burdening a speaker with unwanted speech during the course of a solicitation." *Riley*, 487 U.S. at 800. As the Court explained,

> [t]hese more narrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored. *E.g., Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 537-538 [] (1980). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation

[7] The *Riley* majority offered two similar "unfavorable disclosures" to illustrate how compelled statements of "fact" could burden and detract from a speaker's message. Both examples show that the constitutional prohibition on compelled speech applies to political speakers:

> [W]e would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.

487 U.S. at 797-98, 799.

must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button,* 371 U.S. 415, 438 [] (1963) (citations omitted).

Riley, 487 U.S. at 800-801.

Ohio Revised Code § 3599.09, by its terms, prohibits virtually all anonymous written political speech. As this Court has long recognized, much political speech would never be uttered without the protective shield of anonymity. "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Talley v. State of California,* 362 U.S. at 64. And, romantic notions of the lone orator on a soapbox notwithstanding, laws prohibiting anonymity pose the greatest threat to the speech and associational rights of groups and sects. In states other than Ohio, the threat posed to such group rights by political speaker identification requirements, and the content-based nature of such requirements, are even more readily apparent.

For example, California requires, in the guise of a speaker identification requirement, disclosure of the speaker's affiliations. As discussed above, § 84305 of the California Government Code requires that the name of a "committee" that sends more than 200 pieces of political mail be printed on the outside of the mailing. California laws also requires a committee to include in its name the name of an individual or entity by which the committee is deemed to be "sponsored" or "controlled." As a result, political speakers are compelled to identify on their mailings not only themselves but also those with whom they are associated, and often in a manner that conveys a misleading and politically detrimental impression of the prominence of the role played in the committee by the "sponsor" or "controlling" individual.[8] The result goes beyond mere

[8] For example, the FPPC, interpreting the "sponsored committee" and "controlled committee" provisions, directed a committee formed to oppose a local ballot measure to identify itself as a committee "controlled" by an elected county supervisor and not as a "sponsored committee," notwithstanding the fact that the county supervisor was one of sixteen members of the committee's steering committee, thirteen of the other members served in a representative capacity on behalf of the American Lung Association, the American Heart Association, the American Cancer Society, and a variety of other nonprofit organizations, and the nonprofit organizations were significant contributors to the committee. *See Olson* Advice Letter, Calif. FPPC No. A-89-304 (June 19, 1989). A copy of this Advice Letter has been lodged with the Court and served on the parties.

identification to burden the speaker's message with what may be an unwanted message about the speaker's affiliations.[9]

Ohio Revised Code § 3599.09 is not narrowly tailored because Ohio can and does require those who make expenditures for campaign speech to file detailed campaign finance disclosure forms.[10] The information provided on

[9] In dicta, the *Riley* majority referred to a requirement of the North Carolina statute, not challenged in the case, that a professional fundraiser announce the name and address of his or her employer. *Id.*, at 799 n.11. The majority construed this provision as serving to "require[] professional fundraisers to disclose their professional status to potential donors, thereby giving notice that at least a portion of the money contributed will be retained." *Id.* at 799, n.11. The majority opined that a requirement that a fundraiser "disclose unambiguously his or her professional status" would withstand constitutional scrutiny. *Id.* 799, n.11; *but see id.* at 803-04 (Scalia, J., concurring in part and concurring in the judgment) ("Where core First Amendment speech is at issue, the State can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made."). At most, the dictum in the majority opinion suggests only that senders of political mass mailings might constitutionally be required to include a notice that the mailing was sent by a "candidate" or "committee," a requirement that would not remove the protective shield of anonymity or reveal the sender's affiliations.

[10] Ohio requires campaign committees, political action committees, and political party committees that make expenditures of any amount in connection with the nomination or election of candidates

those forms should be sufficient to enable the State to achieve the statute's purported purpose of identifying persons who distribute false or fraudulent statements. Each expenditure, no matter how small, must be identified by month, day and year, the name and address of the person paid, the object or purpose for which the expenditure was made, and the amount of the expenditure. Ohio Revised Code § 3517.10(B). For every expenditure over $25, a receipted bill (including a canceled check), stating the purpose of the expenditure, must be filed with the statement of expenditures. Ohio Revised Code §§ 3517.10 (B)(4)-(B)(5). The detailed information in the campaign finance reports is also more than sufficient for the other purpose the Ohio Supreme Court found to be served by Ohio Revised Code § 3599.09: giving Ohio's voters "a mechanism by which they may better evaluate [the] validity" of a political message. See *McIntyre*, 618 N.E. 2d at 155-56. As in *Riley* and *Citizens Against Rent Control v. City of Berkeley*, Ohio could, if it chose, pub-

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to office or in connection with ballot issues in the state to file post-election campaign finance statements, and requires those who make expenditures of $1,000 or more to file pre-election statements as well. *See* Ohio Revised Code § 3517.10(A), (C). A "campaign committee" is defined as a candidate or a combination of two or more persons authorized by a candidate to receive contributions and make expenditures. *See* Ohio Revised Code § 3517.01(B)(1). A "political action committee" is any combination of two or more persons, excluding a political party or campaign committee, whose primary or incidental purpose is to support or oppose a candidate, political party, or ballot issue or to influence the result of an election. *See* Ohio Revised Code § 3517.01(B)(8).

The statutory scheme in California is similar. California law requires candidates, ballot measure proponents and opponents, and political action committees to file comprehensive pre-election campaign finance statements twelve (12) days before each election, and requires disclosure within twenty-four (24) hours if "late contributions" or "late independent expenditures" are made in the final days before an election. *See* Calif. Gov't Code §§ 84200.5, 84200.7, 84200.8, 84203, 84203.5. This Court upheld similar campaign finance filing requirements for federal elections in *Buckley v. Valeo*, 424 U.S. 1, 60-84 (1976).

lish the information from the campaign finance statements in order to achieve that voter education purpose.

Reporting requirements give the public access to detailed information about contributors and expenditures of candidates and committees, including their expenditures for campaign mailings, without "[m]andating speech that a speaker would not otherwise make," *Riley*, 487 U.S. at 795. Reporting requirements are thus a readily available and more narrowly tailored means of achieving the state's goals of educating the public and protecting it from fraud and deception. *Id.* at 800; *cf. Citizens Against Rent Control v. City of Berkeley*, 454 U.S. at 298.[11] Assuming *arguendo* that identification, on the mailing itself, of the sender of a political mass mailing might be a more efficient means for Ohio to educate voters or identify those who distribute false statements, it is still beside the point. As this Court declared in striking down another portion of the North Carolina charitable solicitation law,

> . . . North Carolina may constitutionally require fundraisers to disclose certain financial information to the State, as it has since 1981. [Citation omitted.] If this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency. [Citations.]

Riley, 487 U.S. at 795.

The *Riley* decision is thus fully consistent with both *Talley v. State of California, supra*, which struck down a law requiring identification in a speaker's own advocacy materials, and *Buckley v. Valeo, supra*, which upheld

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[11] In *Citizens Against Rent Control v. City of Berkeley*, this Court held that a city's $250 limit on contributions to local ballot measure committees contravened First Amendment speech and association rights, where a companion provision requiring the city to publish lists of contributors before each election obviated the risk that "voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure . . . ." 454 U.S. at 298.

campaign finance report filing requirements. Public filing requirements like those upheld in *Buckley v. Valeo* do not impose unwanted speech on a private speaker's own communications to the public. Such filing requirements are constitutional if supported by a compelling public purpose. On the other hand, statutes such as the charitable-share disclosure requirement invalidated in *Riley* or the speaker identification requirement in Ohio Revised Code § 3599.09 directly burden speech. When less burdensome alternatives exist, these forms of compelled speech cannot withstand exacting First Amendment scrutiny.

2.3 Because speaker identification requirements directly and substantially burden speech protected by the First Amendment, strict scrutiny is required.

Amicus CPAA agrees with Petitioner that the Ohio Supreme Court erred in failing to follow *Burson v. Freeman*, 112 S.Ct. 1846, 1852 (1992) and apply the test of "strict scrutiny" to the Ohio statute. The Ohio court instead relied on *Burdick v. Takushi*, 112 S.Ct. 2059 (1992) to apply the less stringent, more "flexible" standard of serving an "important regulatory interest." This Court has previously stated the applicable rule: "[W]here, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling' [citations] . . . . Even then, the State must employ means 'closely drawn to avoid unnecessary abridgment . . . .'" *First National Bank of Boston v. Bellotti*, 435 U.S. at 786, quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) and *Buckley v. Valeo*, 424 U.S. at 25. This Court has also said, "When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression." *Brown v. Hartlage*, 456 U.S. at 53-54.

As the above cases also emphasize, the test of "strict scrutiny" has *two* prongs: A statute must serve a compelling state interest, *and* it must be narrowly tailored to meet that interest without unnecessarily infringing on other protected rights. Neither prong is satisfied by the Ohio statute, or by other speaker identification statutes.

2.4 No sufficiently compelling state interest has been advanced to justify compelled speaker identification in political speech.

Amicus CPAA agrees with Petitioner that the Ohio court erred in finding that the state's interest "in providing the voters to whom the message is directed with a mechanism by which they may better evaluate its validity" is sufficient to justify compelled speaker identification. Petitioner correctly points out that the voters who hear an anonymous message should be entitled to evaluate all aspects of it, including its source, whether anonymous or not. Petition, pp. 15-16.

In *Talley v. State of California, supra*, this Court recognized the constructive role that anonymous advocacy has played in our nation's political history. 362 U.S. at 64-65. The value of anonymity in political speech is not just a matter of historical interest. The dissent in the Ohio Supreme Court below pointed out the potential chilling effect of prohibiting anonymity in contemporary political affairs: "I believe that the majority minimizes the effect this statute has on the ability of individual citizens to freely express their views in writing on political issues. Many ballot issues, even ones of purely local interest, are controversial." *McIntyre*, 618 N.E.2d at 156-67 (Wright, J., dissenting).

The Illinois Supreme Court has recognized that the potentially chilling effect of compelled speaker identification can actually be counterproductive to the informational

interests of the public. In *People v. White*, 506 N.E.2d 1284 (Ill. 1987), that court relied on *Talley* to hold unconstitutional a requirement for speaker identification on political literature, and explained the potentially chilling effect of prohibiting anonymity:

> By banning anonymity, the law deters many from expressing their opinions at all, resulting in an overall decrease in the flow of information to the public. Far from creating a more informed electorate, the statute extinguishes sources of information.

506 N.E.2d at 1288.

The accuracy of this observation is borne out in contemporary political experience. If anonymity were prohibited, the anonymous source known to this day only as "Deep Throat" would most likely never have given any information to reporters Woodward and Bernstein, and Watergate would be known only as a building. As the court said in *People v. White*, "much of our news concerning national affairs comes from sources which remain unidentified." 506 N.E.2d at 1288.

The Ohio statute, of course, like the speaker identification statute in California, does not prohibit anonymous leaks to the press. On the local level of politics, however, where requirements of speaker identification on printed political material have their primary impact, leaks to the press rarely generate coverage the way they do when national political figures or issues are involved. Often, the only way to effectively disseminate information on the local level, therefore, is by distributing printed material, either by hand (as Ms. McIntyre and Mr. Talley did) or by mail (which is the means of distribution regulated by the California statute). If anonymity is prohibited in such printed speech, information on the local level of the type that is routinely disseminated by "anonymous sources" through the national press will never see the light of day—and the public will be less informed.

2.5 Speaker identification statutes cannot realistically be narrowly tailored to cover only speech that may be regulated.

The Ohio court also found that Ohio's speaker identification statute "serves to identify those who engage in fraud, libel or false advertising," and that identification of such persons so they can be prosecuted under Ohio's statutes prohibiting false statements in political campaigns is a sufficiently compelling reason to justify the statute's infringement on rights protected by the First Amendment. *McIntyre*, 618 N.E.2d at 156. The proper analysis of this contention, however, is not whether the state has a compelling interest in prohibiting false statements in political campaigns, but whether the speaker identification requirement is narrowly tailored to that end.

It may be that the state may permissibly punish those who make false statements during the course of a political campaign, if the constitutional threshold of malice—knowing falsity—is met, because "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison v. State of Louisiana*, 379 U.S. 64, 76 (1964). At the same time, however, "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Id.* at 74. These principles illustrate the problem with compelling speaker identification on *all* political literature for the purpose of identifying those responsible for *false* political literature: such a requirement is too broad. The requirement applies to political speech which is true, or which is opinion, and therefore entitled to the First Amendment's protection of anonymity, as well as to speech that may be false and outside of the protection of the First Amendment.

This is precisely the same problem that this Court held required invalidation of the speaker identification requirement in *Talley*:

> Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance *is in no manner so limited,* nor have we been referred to any legislative history indicating such a purpose. Therefore we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils. [362 U.S. at 64 (emphasis added).]

Justice Harlan, concurring in *Talley,* further described the overbreadth problem:

> Here the State says that this ordinance is aimed at the prevention of "fraud, deceit, false advertising . . ." in that it will aid in the detection of those responsible for spreading material of that character. But the ordinance is not so limited, and I think it will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character. [362 U.S. at 66 (Harlan, J., concurring).]

The Ohio court's conclusion that the Ohio speaker identification requirement will identify those violating Ohio's prohibition against false speech in political campaigns is exactly the same argument that was made by the state in *Talley*, and rejected by this Court. The Ohio statute has the same problem as did the speaker identification ordinance invalidated in *Talley*: it is impermissibly overbroad. It must be invalidated for that reason alone.

CONCLUSION

For the reasons stated above, Ohio Revised Code § 3599.09 should be declared unconstitutional on its face.

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